BRIEF IN SUPPORT OF PETITION.

Specification of Errors.

The Circuit Court of Appeals erred—

1. In holding that the Board had power to order reinstatement of the four individuals in question notwithstanding that they had been guilty of the unlawful conduct specified more particularly at pp. 7-8, *supra*.

2. In holding that the Act required the Company to engage in collective bargaining with the Union, notwithstanding its admitted insistence at all times upon bargaining on behalf of its members only.

3. In affirming and enforcing the Board's orders, which were based on an erroneous conception that the Act restricted an employer's right to express its views to its employees during the course of a labor dispute.

4. In enforcing the order of the Board directing the Company to engage in collective bargaining with the Union in the absence of an election to determine choice of the employees as to a bargaining agency.

5. In enforcing paragraph 1 (d) of the Board's order.

6. In enforcing the order of the Board against the Company.

Argument.

Point I.

The admitted unlawful conduct of the four individuals in question deprived the Board of legal power to order their reinstatement under the Act.

Under Massachusetts law the strike was an illegal strike to force the Company to accept compulsory arbitration in place of due process of law. *Folsom Engraving Co.* v. *McNeil*, 235 Mass. 269; *Reynolds* v. *Davis*, 198 Mass. 294.

These four individuals continued to strike and picket in deliberate violation of a court injunction and were arrested and convicted for a breach of the peace on and near the Company's plant inciting to violence and riot. Under these circumstances the Board and the Court below appear to ignore the clear import of the decision in the case of *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240.

The Court below attempted to distinguish the Fansteel case on the basis of the decisions in the cases of—*Republic Steel Corp.* v. *N.L.R.B.*, 107 F. (2d) 472 (C.C.A. 3);* *N.L.R.B.* v. *Stackpole Carbon Co.*, 105 F. (2d) 167 (C.C.A 3)—in which orders of the Board requiring reinstatement of employees guilty of minor disturbances on the picket line were enforced. These cases, however, rested clearly upon a finding that the offenses committed were in no way designed to effect any compulsion upon the employer and are, therefore, obviously distinguishable from the case at bar.

The only reasons given by the Company for the refusal to re-employ these four individuals was their violation of the injunction and arrest for breach of the peace. The Board's finding of discriminatory discharge rests conspicuously upon its inference of an anti-Union attitude upon the part of the Company alleged to have been disclosed in its communications to its employees, after the unlawful strike had begun.

The drawing of such conclusions has been repeatedly condemned. *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197; *N.L.R.B.* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292; *N.L.R.B.* v. *Remington Rand Inc.*, 94 F. (2d) 862 (C.C.A. 2); *N.L.R.B.* v. *Union Pacific Stages Inc.*, 99 F. (2d) 153 (C.C.A. 9); *N.L.R.B.* v. *Asheville Hosiery Co.*, 108 F. (2d) 288 (C.C.A. 4); *Ballston-Stillwater Knitting Co.* v. *N.L.R.B.*, 98 F. (2d) 758 (C.C.A. 2); *Jefferson Electric Co.* v. *N.L.R.B.*, 102 F. (2d) 949; *N.L.R.B.* v. *Thompson Prod-*

*Limited certiorari granted, 60 Sup. Ct. 1072.

ucts Inc., 97 F. (2d) 13 (C.C.A. 6); *N.L.R.B.* v. *Empire Furniture Corp.*, 107 F. (2d) 92 (C.C.A. 6); *Burlington Dyeing & Finishing Co.* v. *N.L.R.B.*, 104 F. (2d) 736 (C.C.A. 4).

The Board's authority is limited to remedial and not punitive orders, and the Act clearly preserves the employer's right to discharge employees for cause, whether they be at work or on strike. *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1; *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197.

The refusal of the four individuals in question to accept an invitation to return to work following the injunction and their subsequent unlawful conduct and conviction in court removed these individuals from the status of "employees" within the definition of Section 2 (3) of the Act and the authority conferred by Section 10 (c) of the Act, and the Board was therefore without power to order their reinstatement. *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240.

The Board expressly found that, even if the Company's refusal to reinstate these four individuals did not constitute an unfair labor practice, nevertheless, in the opinion of the Board, a reinstatement order was necessary to effectuate the purpose of the Act (R. 2042-2043). The Board has no punitive powers. The following statement of this Court in *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, is pertinent:

> "This authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."

Point II.

The Board's erroneous assumption that the Company, in communicating with its employees, committed an unfair labor practice in violation of Section 8 (1), and upon which finding the conclusions as to violations of Section 8 (3) and 8 (5) were largely predicated, rendered the Board's findings and orders invalid.

While the Court below held that the Board erred in finding that the Company's communications with its employees constituted a violation of Section 8 (1) of the Act, it is respectfully submitted that said Court erred in enforcing the orders of the Board which were based in large measure upon the Board's misconception of the Act. The Board in its decision repeatedly referred to the communications sent by the Company to its employees as the basis for many of its findings, and the Board's unfair, illogical and improper inferences demonstrated a lack of substantial evidence to support its findings and a strong desire to punish the Company for the communications sent to its employees.

The Board's major premise in the case was in conflict with the Constitutional guaranty of freedom of speech and press, as recently expressed in the case of *N.L.R.B.* v. *Ford Motor Co.*, 114 F. (2d) 905 (C.C.A. 6).

Since the Board's conclusions as to a discriminatory discharge of the four individuals in question, the alleged absence of good faith on the part of the Company in collective bargaining, and the back-to-work movement and contracts signed by a majority of the employees with the Company were all founded upon the major premise by the Board that the Company had no right to communicate its views to its employees, the Board's orders were therefore based upon an erroneous view of the law, were unsupported by substantial evidence, and consequently invalid.

Point III.

The Company was not required to engage in collective bargaining with the Union, which at all times insisted upon bargaining in behalf of its members only, and the Board's findings and orders with reference to collective bargaining are therefore invalid.

Section 8 (5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees subject to the provisions of Section 9 (a)." Section 9 (a) provides that representatives designated by a majority of employees shall be the exclusive representative of all the employees for the purpose of collective bargaining, etc. Consequently, if a majority Union refuses to proceed under Section 9 (a) one of the conditions to the existence of the employer's duty under Section 8 (5) is not met. It would seem to follow that an employer can refuse with legal impunity to enter into any negotiations at all concerning a members-only contract, even with a majority Union.

The Board and the Court below attempted to dismiss this contention on the ground that the Company, notwithstanding the insistence of the Union for a members-only contract, stated that it would offer the benefits of any contract finally negotiated to all of its employees. It is submitted that such voluntary and optional offer on the part of the Company, which would give the non-member employees no enforcible rights, would not have the effect of constituting the subsequent negotiations or request for negotiations by the Union collective bargaining within the requirements and purview of the Act.

While this specific question does not appear to have been passed on by any Court, the cases of—*National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350 and *N.L.R.B.* v. *Biles-Coleman Lumber Co.*, 98 F. (2d) 758 (C.C.A. 2)—would seem to support the Company's view. In those cases it was held that

an employer was guilty of a clear violation of the Act by insisting upon recognizing the Union as a representative of its members only for the purpose of collective bargaining. Conversely it is submitted that a majority Union does not lay a proper foundation for collective bargaining under the Act by purporting to act and insisting upon a contract for its members only. The Board and the Court below appear to confuse what an employer is required to do under the Act as distinguished from what it may voluntarily do.

Point IV.

Under the circumstances of this case it was an arbitrary exercise of the Board's power to direct the Company to bargain with the Union two years or more after a large majority of the employees had executed contracts with the Company and had intervened in these proceedings to preserve their rights under these contracts, without requiring an election to determine the employees' choice of a bargaining agency.

On July 13, 1937, 518 employees executed a contract with the Company, said contract being the one which the Union refused to sign (R. 2020-2021).

The Board found that the execution of these contracts by these employees was a result of the Company's communications to the employees (R. 2021). Six months later an independent attorney filed an amended motion to intervene in these proceedings on behalf of 547 employees (R. 41), including all who had signed the contracts on July 13, 1937, and about 117 others, seeking to protect their rights under said contracts. The Board, reversing the Trial Examiner's ruling, allowed this attorney's motion to intervene on behalf of all 547 intervenors (R. 2036). No propaganda was found to have been directed by the Company to its employees after June 14, 1937.

It is submitted that the Board's order directing the Company to bargain collectively with the Union on behalf of all employees, without an election, denies to the employees the full enjoyment of the rights guaranteed under Section 7 of the Act. On this theory this Court, in *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350, approved the action of the lower Court in requiring an election to determine whether the Union was still the choice of a majority of the employees.

Likewise, in *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, where the Board's order was made approximately one year after the plant was reopened, as compared with approximately two years in the case at bar (now approximately three and one-half years), this Court took cognizance of a change in the status of the Union's representation of a majority of the employees and found that there was no basis for a conclusion that the Union remained the choice of a majority of the employees for the purpose of collective bargaining. The Court there refused to enforce the Board's order requiring the Company to bargain with the Union in the altered circumstances and suggested that the Board had abundant authority to settle the question by ordering an election.

See also *Hamilton-Brown Shoe Co.* v. *N.L.R.B.*, 104 F. (2d) 49 (C.C.A. 8).

Point V.

Paragraph 1 (d) of the Board's order, approved by the Court below, is not warranted.

Paragraph 1 (d) of the Board's order directed the Company to cease and desist from interfering with the rights of its employees guaranteed by Section 7 of the Act, in the phraseology of Section 8 (1). The Board in its order directed that the complaint be dismissed in so far as it alleged that the Company had engaged in unfair labor practices within the meaning of Section 8 (2) of the Act (R. 2046).

The Court below refused to confirm the Board's decision and order in so far as it found that the Company's communications with its employees constituted a violation of Section 8 (1) of the Act. The Court below, however, confirmed paragraph 1 (d) of the Board's order directing the Company to cease and desist from interfering with the rights guaranteed under Section 7, because of the findings that the Company had refused to bargain in violation of Section 8 (5) and had been guilty of discriminatory discharges of four employees in violation of Section 8 (3), and on the further ground that the individual contracts signed between the Company and a large majority of its employees constituted a violation of Section 8 (1).

It is submitted that the scope of paragraph 1 (d) of the Board's order under the circumstances of this case is too broad, within the principle of the decision in *N.L.R.B.* v. *Express Publishing Co.*, 61 Sup. Ct. Rep. 696, March 3, 1941.

Conclusion.

The Board's orders as confirmed and enforced by the Circuit Court of Appeals are therefore erroneous as a matter of law, unwarranted by the evidence, and constitute an arbitrary and improper exercise of the powers vested in the Board by the Act. The issues here presented raise important questions of Federal law and the enforcement of said orders would work unreasonable hardships on the Company. We respectfully urge that this Court grant the writ.

Respectfully submitted,

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May 10, 1941.